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# In The
# Supreme Court of the United States
## October Term, 1991

**PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *ET AL.*,**
*Petitioners,*

*v.*

**ROBERT P. CASEY, *ET AL.*,**
*Respondents.*

**ROBERT P. CASEY, *ET AL.*,**
*Petitioners,*

*v.*

**PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *ET AL.*,**
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

**Brief *Amici Curiae* of the Alan Guttmacher Institute, *et al.*, in Support of Planned Parenthood of Southeastern Pennsylvania, *et al.***

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# BRIEF AMICI CURIAE OF THE ALAN GUTTMACHER INSTITUTE, et al. IN SUPPORT OF PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.

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## INTEREST OF AMICI CURIAE

Amici curiae, the Alan Guttmacher Institute, the Los Angeles Regional Family Planning Council, the International Women's Health Coalition, the National Association of Nurse Practitioners in Reproductive Health, the National Family Planning and Reproductive Health Association, the National Society of Genetic Counselors, and the individual members of the associational amici, are integrally involved in women's reproductive health care: they provide or supervise reproductive medical care; they teach in medical schools; and they provide information and counseling about reproductive health care matters, including contraception and genetics.[1]

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[1] A more complete description of each amicus is set forth in Appendix A to this brief.

The interest of amici stems from their obligation to provide medical care of the highest quality. Amici file this brief on behalf of petitioners, after securing the consent of petitioners and respondents,[2] and submit that that part of the Court of Appeals' decision classifying the right to privacy as a "limited" fundamental right and upholding the Pennsylvania law should be reversed.

Women's reproductive health care is in crisis. High rates of maternal and infant mortality, increased incidences of breast cancer, unintended pregnancies, declining contraceptive options, restrictions on abortion, increased infertility, and an epidemic

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[2] See Appendix B for copies of these letters of consent.

of sexually transmitted diseases, including the HIV virus, all threaten the well-being of women.[3] Although the solutions to many of these problems are well known, health professionals' remedial efforts are stymied by restrictive laws -- such as the Pennsylvania statute -- which endanger both women and reproductive health care providers.[4]

The sound practice of reproductive health care requires the ready availability of the full range of modern medical services, including contraceptives, genetic screening, and safe and legal abortion. Amici's

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[3] R. Duke, et al., Women's Reproductive Health: A Chronic Crisis, 266 J. A.M.A. 1846 (1991) (hereinafter cited as "Women's Reproductive Health").

[4] See id. at 1847.

professional experience is that obstructing or delaying the availability of appropriate reproductive health care will severely impair medical practice and will result in serious injury or death to many women and their children.

Amici are particularly concerned that any further erosion of the woman's fundamental right of privacy articulated in Roe v. Wade, 410 U.S. 113 (1973), as applied to abortions, inevitably will have an adverse impact on the right of privacy in every other aspect of reproductive health care, including contraception, genetic testing, and medically-assisted conception such as in vitro fertilization.

## BACKGROUND STATEMENT

Amici include the primary health care providers of many of the 55 million

women of reproductive age in the United States.[5] Each of these women has unique needs and medical conditions which influence her decisions about whether and when to become pregnant.

It is difficult to overestimate the importance to a woman of controlling her own fertility: the power to plan each pregnancy often foretells the woman's educational attainment, economic stability, and very health and longevity. With safe and accessible contraceptives, women live longer, healthier lives.[6]

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[5] Ory, et al., Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods 10 (Alan Guttmacher Institute 1983) (hereinafter cited as "Making Choices").

[6] See F. Cunningham, P. MacDonald & N. Gant, Williams Obstetrics 4 & Table 1-2 (18th ed. 1989) (hereinafter cited as "Williams Obstetrics").

No contraceptive method, however, is perfect. Although more than 92 per cent of sexually active women use some contraceptive method,[7] every year more than three million American women face an unintended pregnancy. Approximately 45 per cent of women in the United States will have an abortion during their lives.[8]

Even in the age of modern obstetrics, women face considerable risks from pregnancy, especially those that are unintended. Mentally retarded

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[7] Forrest, et al., U.S. Women's Contraceptive Attitudes and Practice: How Have They Changed in the 1980s? 20 Fam. Plan. Persp. 112, 116 (1988).

[8] Making Choices, at 10. It is estimated that in the United States, "about two thirds of women will have an unintended pregnancy in their lifetime and about 45 per cent will have an abortion." Women's Reproductive Health, at 1847.

women unable to understand how they became pregnant experience elevated health risks, as do women with other medical conditions such as coronary artery disease, diabetes, and hypertension. Even healthy women over 30 have a higher risk of maternal death than do younger women.[9]

Pregnant women younger than age 15 particularly face elevated medical perils. Teens suffer higher incidences of toxemia, anemia, miscarriage, and premature and prolonged labor. The maternal mortality rate for mothers

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[9] Centers for Disease Control Surveillance Summaries, Special Focus on Reproductive Health Surveillance 9 (July 1991), (hereinafter cited as "CDC Special Focus on Reproductive Health"). Women between the ages of 35-39 are almost four times more likely to die than women ages 20-24; this risk is almost ninefold for women over 40. Id. at 9 and Table 2.

under 15 is 1000 times higher than for women in their 20's and 200 times higher for women between 15 and 19.[10]

Some medical difficulties arise during the pregnancy. These include problems caused by the pregnancy itself, such as toxemia or preeclampsia, which may elevate the woman's risk of death or injury if the pregnancy continues.[11] Pregnancy often accelerates the progress

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[10] Sacker & Neuhoff, "Medical and Psychological Risk Factors in the Pregnant Adolescent," in Pregnancy and Adolescence: Needs, Problems, and Management 107, 127 (I. Stewart et al., eds. 1982). Children born to teens suffer, too. Teens who give birth at an age younger than 15 particularly risk low birth weight infants and premature deliveries. Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Hasn't Gone Away 29 (1981). Low birth weight and premature labor are the leading causes of infant mortality and childhood disease. Williams Obstetrics at 4.

[11] Williams Obstetrics at 3.

of the HIV infection (AIDS), jeopardizing the life of the woman and any child she might have.[12]

Effective contraception and legal abortion present less of a threat to women's health and lives than does childbirth. More than 51 per cent of maternal deaths occur in connection with a live birth; only 4.7 per cent of maternal deaths occur in connection with legal abortions.[13] Thus, forcing even healthy women of optimal age to carry an unintended pregnancy to term increases

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[12] Koonin, et al., Pregnancy Associated Deaths due to AIDS in the United States 261 J. A.M.A. 1306, 1308 (1989).

[13] CDC Special Focus on Reproductive Health at 11. Similarly, the ratio of deaths per 100,000 live births for the years 1979 to 1986 was 9.1, id. at 9; the ratio of deaths per 100,000 abortions for 1981-85 is 0.6. R. Gold, Abortion and Women's Health: A Turning Point for America 28-29 (1990).

their risk of death and disease. State laws which impede access to legal abortion and effective contraception inevitably will force some women to turn in despair to illegal abortion.

For millions of women who want to conceive and bear a child, complete reproductive health care must include the option of genetic counseling, prenatal testing, and diagnosis, all of which are threatened by statutes -- like Pennsylvania's -- defining protected life as beginning at fertilization.[14]

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[14] At least 11 states define protected life as the equivalent of the fertilized ovum. Those states include Illinois, Ill. Rev. Stat. ch 38, § 81-22 (1989); Kentucky, Ky. Rev. Stat. § 311.720 (1990); Louisiana, La. Rev. Stat. Ann. § 40:1299.35.1 (West 1991); Massachusetts, Mass. Ann. Laws ch. 112, § 12K (West 1983); Minnesota, Minn. Stat. Ann. § 144.343 (West 1989); Missouri, Mo. Ann. Stat. § 188.015 (Vernon 1992); Nebraska, Neb. Rev. Stat. § 28-326 (1989); Oklahoma, Okla. Stat.

Prenatal diagnosis is especially essential for women who have an increased risk of giving birth to a child with a serious disease or genetic condition.

Once a physician learns that the fetus has a genetic anomaly, professional medical standards mandate that, within appropriate time limitations, the woman be informed of her option to terminate the pregnancy.[15]

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Ann. tit. 63, § 1-730 (West 1984); South Carolina, S.C. Code Ann. § 44-41-10 (Law Co-op 1991); Wisconsin, Wis. Stat. Ann. § 940-04 (West 1982); and Wyoming, Wyo. Stat. Ann. § 35-6-101 (1990).

[15] See American College of Obstetricians & Gynecologists, Standards for Obstetric-Gynecologic Services 62, 64-65 (7th ed. 1989) (hereinafter cited as "ACOG Standards"); see also A. Milunsky, "Genetic Counseling: Prelude to Prenatal Diagnosis", in Genetic Disorders and the Fetus: Diagnosis, Prevention and Treatment 4, 20-21 (1986) (hereinafter cited as "Milunsky, Genetic Counseling").

State laws -- like Pennsylvania's -- that force those women to receive certain information about the developing fetus and to wait a specified time period after they have already decided to terminate the pregnancy only increase the severe emotional trauma of such tragedies.

Finally, for the millions of couples who want children but experience fertility problems,[16] medical assistance in achieving pregnancy is indispensable. Technological advances used to help women desiring children become pregnant include: in vitro fertilization, and its variations of gamete intrafallopian transfer ("GIFT") and zygote intrafallopian transfer ("ZIFT"); the flushing of an embryo from the uterus of

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[16] Williams Obstetrics at 920.

one woman for subsequent insertion into the uterus of another woman; and the cryopreservation of any excess embryos produced. By defining the fertilized ovum as a person with legal rights, the states inhibit research that advances their stated goal of fostering childbirth.

## SUMMARY OF ARGUMENT

If upheld, the Pennsylvania statute and others like it, unquestionably will disrupt the delivery of the full range of reproductive health care to millions of American women. The Pennsylvania definition of fetus as the equivalent of "fertilization" and of "conception" -- "the fusion of a human spermatozoan with a human ovum"[17] -- and similar

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[17] 18 Pa. Cons. Stat. Ann. § 3203 (Purdon 1991).

definitions adopted by at least 11 other states contravene science and modern medical practice. By upholding a statute premised upon this definition and by devaluing reproductive privacy to the status of a "limited" fundamental right, the Court of Appeals has opened the door to government interference not only in decisions about abortion, but also in such inherently personal matters as decisions about contraception, assisted conception, and other uses of reproductive technology. Such interference, if sustained by this Court, will strike at the heart of basic concepts of individual liberty in our free society. See Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Eisenstadt v. Baird, 405 U.S. 438

(1972); see also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

## ARGUMENT

### I. THE RIGHT OF REPRODUCTIVE PRIVACY IS ONE OF OUR MOST CHERISHED AND FUNDAMENTAL RIGHTS.

Central to our Constitution's concept of ordered liberty is the right of individuals to make informed decisions about "whether to bear or beget a child." Eisenstadt, 405 U.S. at 453. This constitutional right of privacy, whose heritage is "older than the Bill of Rights," Griswold, 381 U.S. at 486, resolutely "protects individual decisions in matters of childbearing," Carey v. Population Services International, 431 U.S. 678, 687 (1977) (White, J., concurring in pertinent part and concurring in result), because "such decisions are none of government's

business." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 792 n.2 (1986) (White, J., dissenting). Indeed, no right can be more fundamental or more firmly rooted in this nation's history and tradition than the right to personal bodily integrity and autonomy.[18]

The fundamental right of reproductive privacy enunciated in Griswold, Eisenstadt, and Roe was the culmination of a long continuum of cases stemming back at least as far as Union Pacific Railway Co. v. Botsford, 141

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[18] See Cruzan v. Director, Missouri Department of Health, ___ U.S. ___, 110 S. Ct. 2841, 2856 (1990) (O'Connor, J., concurring) ("[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause").

U.S. 250, 251 (1891)(citation omitted), in which this Court stated:

> No right is held more sacred or is more carefully guarded, than the right of every individual to the possession and control of his own person[.] . . . "The right to one's person may be said to be a right of complete immunity; to be let alone."

This right, which has come to be known as the right of privacy, protects a broad spectrum of individual decisionmaking from governmental interference, Whalen v. Roe, 429 U.S. 589, 599-600 (1977), including decisions about: marriage, Safley v. Turner, 482 U.S. 78, 95-96 (1987); child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); contraception, Griswold, 381 U.S. at 486, and Eisenstadt, 405 U.S. at 453; and abortion, Roe, 410 U.S. at 150-

54. To snip at even one thread of the carefully woven fabric of constitutional privacy, as the Third Circuit does by severing abortion from this continuum, threatens to unravel the entire doctrine.

**A. Classifying "Privacy" As A "Limited" Fundamental Right Misconstrues Decades Of This Court's Jurisprudence.**

The Third Circuit's notion that a woman's privacy right to choose an abortion is but a "limited" fundamental right, and that only an "undue burden" on the exercise of that right may be found unconstitutional, Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 688, 694-98 (3d Cir. 1991), is inaccurate and propounds an illegitimate and unworkable standard of constitutional litigation. There is no such thing as a limited fundamental

right, and no right has ever been so designated in this Court's jurisprudence. (See Brief of Plaintiffs-Petitioners for a comprehensive discussion of the problems created by such a standard.)

Classification of a right as "fundamental" reflects a judgment that the right is so important in our constitutional constellation that the government's power to regulate or limit the exercise of that right must, of constitutional necessity, narrowly be constrained. See United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938). For the past half-century, this Court's decisions have delineated between rights which are considered fundamental, and those which are not. See L. Tribe, American Constitutional

Law §§ 11-1 - 11-5, at 769-84 (2d ed. 1988) and cases cited therein.

In creating the "limited" fundamental rights classification, 947 F.2d at 688, the Court of Appeals misconstrues this Court's fundamental rights jurisprudence as well as its privacy and abortion jurisprudence.[19] One searches the annals of constitutional law in vain to find a decision of a majority of this Court

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[19] Neither this Court's majority opinion nor Justice O'Connor's dissent in City of Akron v. Center for Reproductive Health, 462 U.S. 416 (1983), create the separate classification of "limited" fundamental right. To the contrary, in her Akron dissent, Justice O'Connor specifically embraces the fundamental rights classification, albeit disagreeing with the result reached by the majority. Akron, 462 U.S. at 452-53 (O'Connor, J., dissenting).

creating a third category of rights -- "limited" fundamental rights.[20]

The Third Circuit's analysis has profound implications for all of the other rights which this Court has long deemed fundamental and has evaluated under the strict scrutiny standard. The practical effect of the Third Circuit's "limited" fundamental right/undue burden analysis could be to evaluate nearly all state restrictions on all fundamental rights under the rational basis test.

The Court of Appeals' designation of privacy as a "limited" fundamental

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[20] Notwithstanding the foregoing, the Constitution does not deny government all authority to enact laws that may touch upon or even limit certain exercises of fundamental rights. But, in such cases, the government must show a compelling state interest and that the statute at issue is narrowly tailored to advance that interest. See L. Tribe, American Constitutional Law § 11-1, at 770 and cases cited therein.

right, 947 F.2d at 688, also profoundly misconceives the nature of the privacy right in such cases as Griswold and Eisenstadt. Constitutional protection for the right of privacy does not depend on the absence of the fetus, but rather is a right "as against the Government . . . to be let alone," Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) to make procreative decisions. As this Court acknowledged in Roe, the presence of the fetus does not undercut the "fundamental" nature of the privacy right, but instead invokes the countervailing state interests of maternal health and fetal life at various stages of the pregnancy. Roe, 410 U.S. at 162-63.

Indeed, the right of privacy may be more critical after conception given the profound and inevitable effect of bearing a child on a woman's future life. A pregnant woman has no choice but abortion to avoid bearing a child against her will, whereas a woman denied the use of contraceptives can avoid pregnancy by abstaining from sexual intercourse. Carey, 431 U.S. at 713 (Stevens, J., concurring).[21]

Thus, any attempt to limit the privacy right based on the "potentiality" of the life of the fetus must fail. Although perhaps "potential

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[21] See also Thornburgh, 476 U.S. at 776 (Stevens, J., concurring): "I fail to see how a decision on childbearing becomes less important the day after conception than the day before. Indeed, if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the postconception decision that is the more serious."

life is no less potential in the first weeks of pregnancy than it is at viability or afterward," Akron, 462 U.S. at 461 (O'Connor, J., dissenting), for that matter, life is no less "potential" at the point at which a man and a woman engage in sexual intercourse. Nor is it any less "potential" at fertilization, the point at which Pennsylvania would protect life. However, protecting all such "potential" life could eviscerate modern contraceptive practice. See infra at 37-45.

It is not the abstract "potential" for life that the Court in Roe recognized as compelling enough to justify narrow restrictions on post-viability abortions. Rather, it is the probability of a live-born person that Justice Blackmun's viability

determination addressed as the point at which the state's interest in the life of the fetus becomes compelling. Roe, 410 U.S. at 164-65. As Justice Stevens stated in his concurrence in Thornburgh, 476 U.S. at 778 (citations omitted):

> I should think it obvious that the state's interest in the protection of an embryo -- even if that interest is defined as "protecting those who will be citizens," ibid. -- increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus -- and pregnancy itself -- are not static conditions, and the assertion that the government's interest is static simply ignores this reality.

To deny the fundamental nature of the privacy right and to lower the standard of review from "strict scrutiny" to "undue burden" could, if the Court of Appeals is upheld, eviscerate not only the right to

abortion, but every other aspect of the right to privacy. This case demonstrates that the practical effect of the Third Circuit's "limited" fundamental rights/undue burden analysis on restrictions on reproductive privacy is to almost always find no undue burden and to uphold nearly all such restrictions under the rational basis test; the Court of Appeals itself concedes that the relevant challenged provisions of the Pennsylvania statute would fail to pass constitutional muster under the strict scrutiny standard. Casey, 947 F.2d at 697, 706 and n.20.

Under the Court of Appeals' analysis, restrictions on the right to use contraception and technology-assisted methods of conception arguably could be sustained under the rational

basis standard of review, absent a showing of undue burden. Given this deferential standard, could government, in a time of overpopulation, force a pregnant woman to use Norplant, or, given today's concerns over AIDS, could government compel every man to wear a condom?

The consequences of a decision upholding the Court of Appeals would be dire indeed. At a minimum, women in at least eleven other states could be stripped of the right to use effective, post-fertilization contraception; and women in the remaining states could face protracted legislative and judicial battles over the scope of their now-limited right of reproductive privacy.

**B. Allowing States, Under The "Undue Burden" Standard, To Define "Fetus" And "Life" In A Scientifically Incorrect Manner Threatens All Reproductive Rights.**

Neither the undue burden test nor the rational basis test, also used by the Court of Appeals, achieves in any principled manner the state's purported goal of protecting potential life. The practical effect of both tests could be to permit state legislatures to inaccurately define the fetus and life, and thereby place such restrictions on abortion, contraception, and other reproductive health care as to all but ban them.

All of the challenged Pennsylvania provisions are premised on the definitions in section 3203. Contrary to Pennsylvania's attempt to define the fetus as the equivalent of

"fertilization" and "conception," conception is not a single stage or one-step process, let alone something as simplistic as the mere "fusion of the spermatozoan with a human ovum." Fertilization of the ovum by the sperm, the first stage in conception, is itself a continuum of multiple interdependent steps before the first cell division (cleavage).[22] Only if a normal first

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[22] R. Glass, "Egg Transport and Fertilization," in 5 Gynecology and Obstetrics ch. 46 at 2-3 (J. Sciarra, ed., rev. ed. 1985).

The fertilization period of the human ovum is estimated to range between 12 and 24 hours. During this period, a sperm cell must penetrate the zona pellucida, an acellular glycoprotein, which surrounds the ovum at ovulation. The head of the sperm cell that has penetrated the zona pellucida makes initial contact with a second membrane, the vitelline (egg) membrane. The egg membrane engulfs the sperm head resulting in a fusion of egg and sperm membrane. The chromatin material of the sperm head then decondenses, forming the

cleavage does occur, has fertilization been successful.

Implantation also is a multi-stage continuum. The fertilized ovum -- zygote -- undergoes a slow cleavage into a blastocyst. After the blastocyst is transported into the uterus, the zona pellucida dissolves, a prerequisite to successful implantation. The blastocyst then adheres to the surface of the endometrium (lining of the uterus) in the first stage of implantation. After a process in which the epithelium (a sheetlike layer of tissue) of the endometrium erodes, the blastocyst sinks

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male pronucleus. Subsequently, the female and male pronuclei move toward each other. As this happens, the limiting membranes surrounding each nucleus break down, and a spindle is formed on which the chromosomes become arranged. The cell (called a zygote) is now ready for the first cell division. See Glass at 3.

into the endometrium and, finally, becomes totally encased.[23] When this staged process is complete, approximately six to seven days after the fertilization process set forth above, implantation has finally occurred.[24]

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[23] Williams Obstetrics at 40.

[24] Even then, the formation of a single individual with a unique immutable genetic blueprint (and thus a single "soul") is not assured. There is a possibility that twins may develop from the blastocyst until at least 12 days after fertilization. Dawson, Fertilization and moral status: A scientific perspective, in Embryo Experimentation 49 (P. Singer et al. eds. 1990) (hereinafter cited as Fertilization and moral status). Conversely, a chimera may be formed when two or more pre-embryos fuse and contribute to the development of a single prenate. Id.at 56. Also, even after implantation, the growing mass of cells can become a hydatidiform mole (tumor) rather than a fetus, a medically dangerous condition for the woman which will never produce a live birth. Williams Obstetrics at 540-42.

At each of the various and complicated stages described above, development may stop. It is estimated that "for up to 78 per cent of fertilizations the endpoint is loss rather than progression to the next developmental stage."[25]

Defining pregnancy and the fetus as the equivalent of the fertilized ovum, and then defining abortion as terminating a clinically diagnosable pregnancy, brings post-fertilization birth control methods within the ambit of Pennsylvania's criminal abortion statute because it now is possible to detect fertilization even prior to implantation and thereby act early on to

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[25] Fertilization and moral status at 49.

prevent it.[26] Recognizing that, since Griswold, this Court has not upheld any state law shown to restrict birth control, Pennsylvania attempts to save its law by cosmetic surgery that on the surface is appealing but that doesn't solve the problem. Pennsylvania attempts this charade by exempting certain methods of post-fertilization birth control from the definition of abortion in section 3203, namely the birth control pill and the intrauterine

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[26] Although all pregnancy tests test for the presence of human chorionic gonadotrophin (hCG), a hormone produced by the blastocyst, new experimental tests are being designed to detect hCG after fertilization but even before implantation occurs. See, e.g., Saxena, Measurement and clinical significance of preimplantation blastocyst gonadotrophins, J. Reprod. & Fertil. 115, 118 (1989). See also R. Creasy and R. Resnik Maternal-Fetal Medicine: Principles and Practice 113 (2d ed. 1989).

device ("IUD"), and, more generally in section 3208.1, by prohibiting any interference with "medically appropriate methods of contraception." Those attempts, however, must fail as must those of any statute whose definition of abortion is premised on an erroneous and irrational definition of the fetus as the fertilized ovum.

First, by specifically exempting only the IUD and the birth control pill, Pennsylvania ostensibly could ban other well-established methods of post-fertilization contraception such as Norplant and some uses of RU 486. Other post-fertilization methods of contraception not presently available or developed also apparently would be banned by section 3203. Section 3208.1 does not vitiate the ban because a

physician must guess at his or her peril what Pennsylvania considers "medically appropriate methods of contraception." Such vagueness and uncertainty offends even the most elemental concept of due process of law because, at a minimum, criminal laws must be drafted so clearly as to leave no uncertainty as to what conduct is prohibited. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

Second, the Pennsylvania statute, as well as every other state statute premised on the erroneous definition of protectable life as the fertilized ovum, must also fall because it is irrational. It is irrational because there is no scientific, medical, or moral basis for creating a legal distinction between fertilized ova, enforced by criminal

sanctions, based solely on the method used to prevent the ovum from developing into a term pregnancy. There is no moral distinction between preventing a fertilized egg from implanting by chemical means such as a pill or preventing implantation by mechanical means such as menstrual extraction. Line drawing by a state legislature must at least meet the standard of rationality, see, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47 (1985), and any statute premised on an erroneous definition is, a fortiori, irrational.

The consequence of the definitional errors made by Pennsylvania, and at least 11 other states, have profound implications for women's reproductive health care. Faced with an inaccurate

definition of when protectable life begins, a reproductive health care provider is left to flounder in a sea of legal uncertainty when prescribing well-accepted contraceptives that may prevent implantation of the blastocyst, and when using medical advances aimed at assisting conception and pregnancy.

### 1. The Undue Burden Standard Would Allow Severe Restrictions On The Right To Use Contraceptives.

Many common methods of contraception, as one possible working mechanism, interfere with the implantation of the blastocyst in the

endometrium. The IUD,[27] Norplant,[28] and certain low dose oral contraceptives[29]

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[27] Hutchings, et al., The IUD After 20 Years: A Review, 17 Fam. Plan. Persp. 244, 245 (Nov./Dec. 1985). See also U.S. Dept. of HHS, IUDs: Guidelines for Informed Decision-making and Use, (1987); R. Hatcher, et al., Contraceptive Technology 377 (15th ed. 1990) (hereinafter cited as "Contraceptive Technology").

Although experts cannot ascertain how the IUD prevents pregnancy in each individual case, it is generally recognized that prevention of implantation is one working mechanism of this contraceptive device. American Medical Association, Data Assessment of IUD, 261 J. A.M.A. 2127, 2128 (1989); D. Mishell, Intrauterine Devices, 22 Clinics in Obstet. and Gynecol. 679, 680 (1984).

[28] As with the IUD, Norplant has several mechanisms of action, including suppressing ovulation. In addition, one of its functions is to inhibit development of the endometrium, thereby preventing implantation. Shoupe & Mishell, Norplant: Subdermal implant system for long-term contraception, 160 Am. J. Obstet.-Gynec. 1286, 1287 (1989).

[29] The newer combined oral contraceptives, in addition to suppressing ovulation, also frustrate

all are thought on occasion to prevent implantation.

By adopting a scientifically invalid definition of when life begins, states interfere with the rights of millions of women who use contraceptive methods that can act after fertilization, forcing them to use barrier contraceptive methods which are less reliable contraceptives. Eighteen per cent of diaphragm users, 12 per cent of condom users, and 28 per cent of sponge users experience an accidental

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conception in other ways, including affecting the transportation of the fertilized ovum through the fallopian tubes, so as to decrease the likelihood of implantation. Making Choices at 5; See Contraceptive Technology at 228-29.

Many women use combined oral contraceptives, which have lower levels of estrogen, because of the perceived health risks of the older, higher estrogen-dose pills. See Contraceptive Technology at 228.

pregnancy within the first year of use.[30] Given these high rates of failure and the millions of unintended pregnancies resulting every year, women using less effective methods of contraception have a heightened interest in abortion when their contraception fails. Similarly, when prescribing a less effective contraceptive, physicians have a responsibility to advise a woman of her option to terminate her pregnancy. Thus, ironically, and somewhat irrationally, the Pennsylvania law and the similar laws of other states, could result in more unintended pregnancies and the need for even more abortions.

Some contraceptives, such as high doses of oral contraceptives, are

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[30] Contraceptive Technology at 134.

administered with the specific intent of preventing implantation after fertilization has occurred, especially in treatment for sexual assault victims. A woman who has been raped is desperate to avoid pregnancy,[31] and it is standard treatment for a physician to administer post-coital contraceptives in such a case. This treatment most likely will prevent implantation,[32] as will post-coital insertion of an IUD.[33]

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[31] See Burgess & Homstrom Rape: Crisis and Recovery 214 (1979).

[32] See C. Cook, M.D., et al., Pregnancy Prophylaxis: Parenteral Postcoital Estrogen, 67 Obstet. & Gynecol. 331-33 (1986); E. Adashi, M.D., The Morning After: novel hormonal approaches to postcoital interception, 39 Fertil. & Steril. 267-69 (1983).

[33] M. Fasoli, M.D., et al., Post-coital contraception: an overview of published studies, 39 Contraception 459, 465-66 (1989).

Used in this manner, post-coital contraceptives spare the woman who has suffered sexual assault the agonizing wait until the onset of the next expected menstrual period to learn whether she is pregnant. She thus is relieved of the need to consider whether to undergo a surgical abortion at that point. Yet, the Pennsylvania law and others like it threaten this humane use of post-coital contraceptives.

Such laws also will restrict research on the development of new contraceptives which are thought to inhibit implantation.[34] The most

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[34] Restricting access to certain contraceptives appears to be the goal of many of the opponents of legal abortion. Kaeser, Contraceptive Development: Why the Snail's Pace?, 22 Fam. Plan. Persp. 131, 132 (1990); Brahams, Abortion and assisted parenthood in the USA, 337 The Lancet 228, 228 (1991); Roberts, U.S. Lags on Birth Control Development, 247

significant new development in post-coital contraceptive technology, RU 486, is considered to have great potential precisely because it can act during the indeterminate period between fertilization and a viable pregnancy. This drug will induce menses in women who are not pregnant and also will block the working action of progesterone -- the hormone which supports implantation of the fertilized ovum -- thus

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Science 909 (1990).

Restrictive contraceptive laws long have had a negative impact on reproductive health care. For example, the two American scientists who developed the first oral contraceptives were barred by state law from performing their clinical trials in the state in which they practiced. They were forced instead to conduct such trials in Puerto Rico. Potts, Birth Control Methods in the United States, 20 Fam. Plan. Persp. 288, 289 (1988).

terminating pregnancy when implantation has occurred.[35]

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[35] Baulieu, RU 486 as an Antiprogesterone Steroid: From Receptor to Constragestion and Beyond, 262 J. A.M.A. 1808, 1811-13 (1989); A. Ulmarn, et al., RU 486, 262 Scientific Am. 42, 46-47 (1990). Similarly, researchers are currently developing a vaccine of anti-sperm antibodies. Instead of testing this vaccine in a limited clinical trial which could result in unwanted pregnancies or abnormalities in subsequent children, the effectiveness of the vaccine is being assessed by blocking fertilization in vitro. Unless the vaccine is 100 per cent effective, pre-embryos will inevitably be created, and ultimately destroyed.

Restrictions on the use of RU 486 as a contraceptive or contragestive also have profound, and negative, implications for its use in treating other conditions such as breast cancer. Preliminary trials, which have not been conducted in this country because of anti-abortion pressure on the political system, strongly suggest that RU 486, is highly effective in treating breast cancer. Goldsmith, As Data on Antiprogesterone Compounds Grow, Societal and Scientific Aspects are Scrutinized, 265 J. A.M.A. 1628, 1628 (1991); Ulmarn, et al., RU 486, 262 Scientific American 42, 48 (1990).

By restricting the use of contraceptives which prevent implantation, such statutes interfere with the fundamental right of privacy to use contraception and thus violate the Constitution. Webster v. Reproductive Health Services, 492 U.S. 490, 523 (1989) (O'Connor, J., concurring) (the use of post-fertilization contraceptive devices is constitutionally protected by Griswold and progeny); 492 U.S. at 564 (Stevens, J., concurring in part, dissenting in part) ("[t]o the extent the Missouri statute interferes with contraceptive choices, . . . it is unconstitutional"); Griswold, 381 U.S. at 485-86; Eisenstadt, 405 U.S. at 453-55.[36]

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[36] See also Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (striking down Illinois abortion law which defined the

**2. Laws Defining Protectable Life As The Fertilized Ovum Unconstitutionally Restrict The Use Of Reproductive Technologies.**

The right to privacy includes the right to bear a child, see Maher v. Roe, 432 U.S. 464, 472 n.7 (1977) (right to carry a pregnancy to term is fundamental), and to seek assistance of a physician to effectuate one's reproductive plans. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983) (full vindication of right to make reproductive decisions requires that physician be given room to make "best

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fetus to mean "a human being from fertilization until birth"); Charles v. Daley, 749 F.2d 452, 462 (7th Cir. 1984) (statutory sections which would affect use of post-fertilization contraceptives infringe upon privacy right to use contraceptives), appeal dism'd sub nom., Diamond v. Charles, 476 U.S. 54 (1986).

medical judgment"). Further, the right to privacy includes a right to use reproductive technologies, such as in vitro fertilization (IVF). See Lifchez v. Hartigan, 735 F. Supp. 1361, 1376-77 (N.D. Ill. 1990). State laws defining protectable life as the conceptus unconstitutionally restrict the use of reproductive technology.

IVF for example, provides a unique opportunity for the study of human reproduction and early development with far ranging implications for the treatment of infertility and other areas of research.[37] With IVF or any of its

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[37] Through IVF, gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT) technologies, 3,472 couples gave birth to children in 1989 alone. The American Fertility Society, In vitro fertilization-embryo transfer in the United States: 1989 Results from the IVF-ET Registry, 55 Fertil. and Steril.

derivative procedures, physicians often fertilize ten or more ova than will be transplanted into the woman's uterus. Because embryos do not survive in the lab more than six days past fertilization,[38] many of the excess embryos ultimately will be discarded. Some embryos may be preserved through cryopreservation for subsequent cycles if the first transfer fails or may be donated to other infertile couples. But even then, 30 per cent of the embryos cannot survive the freezing process.[39]

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14, 15 (1991).

[38] Dawson, Introduction: An Outline of scientific aspects of human embryo, in Embryo Experimentation 6 (D. Singer, et al., eds. 1990).

[39] Jones, Cryopreservation and its Problems, 53 Fertil. and Steril. 780, 783 (1990).

Physicians, fearing prosecution for the destruction of pre-embryos under a statute that defines the fertilized ovum as a person with legal rights, may decline not only to perform these life-generating procedures, but also to conduct research into others. Recognizing that its abortion statute thus frustrates rather than advances its stated goal of promoting and protecting live childbirth, Pennsylvania, as with contraception, ostensibly permits in vitro fertilization by setting forth in section 3213(e) specific public reporting requirements for all persons involved in conducting or experimenting in in vitro fertilization. These requirements not only add to the burdens imposed by the other challenged provisions of the statute, but also are

totally irrational because they can serve no purpose but to eliminate technologically-assisted reproduction. What legitimate purpose is served by requiring reproductive health professionals to report the number of eggs fertilized and destroyed or discarded, the number of women implanted with a fertilized egg, and the names and addresses of all persons and facilities involved in technologically-assisted reproduction?

More importantly, all who employ reproductive technology are still left to guess at their peril whether discarding the fertilized egg is "abortion" within the ambit of the statute because section 3216(e) expressly provides that nothing in the statute shall "be construed to condone

or prohibit the performance of in vitro fertilization and accompanying embryo transfer."

The restrictive consequences of state laws defining the conceptus as protectable life are not confined to IVF, but also limit advances in genetic testing, a critical component of modern obstetric care. See note 15, supra. For example, embryo biopsies soon will be able to detect genetic abnormalities in an embryo before implantation. This procedure could eliminate the need for an infertile couple to undergo a possibly emotionally devastating therapeutic abortion. Fertile couples with a high risk of passing a genetic disorder on to their children also could avoid a therapeutic abortion with an

embryo biopsy.[40] The right to obtain genetic information about the zygote so as to make an informed decision about whether to choose to have an abortion because of genetic indications, see generally, Roe, 410 U.S. 113; Smith v. Cote, 513 A.2d 341, 355 (N.H. 1986) (Souter, J., concurring), is restricted by the Pennsylvania law, which would appear to demand compliance with the challenged "informed" consent and mandatory waiting period provisions.[41]

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[40] See Michael & Buckle, Screening for genetic disorders: therapeutic abortion and IVF, 16 J. Med. Ethics 43, 43 (1990).

[41] Once again, section 3216(c) of the Pennsylvania statute forces the reproductive health professional to guess at his or her peril precisely what is prohibited when it specifically provides that "nothing in this section shall be construed to condone or prohibit the performance of diagnostic tests while the unborn child is in utero . . . ."

Carrying a pregnancy to term when the child is destined to be stillborn or to die shortly after birth is emotionally devastating.[42] In a recent clinical trial, 97 per cent of the women carrying a fetus with severe genetic anomalies chose to terminate the pregnancy.[43] The additional requirements of the challenged provisions of the Pennsylvania abortion statute -- such as the 24 hour waiting period -- serve only to increase the emotional trauma experienced by women who have already made the decision to

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[42] Furthermore, many women may not have the financial or emotional ability to care for a seriously ill child. If a woman already has children or a job, she may be forced to neglect the other members of her family and quit her job.

[43] Drugan, et al., Determinants of Parental Decisions to Abort For Chromosome Abnormalities, 10 Prenat. Diag. 483, 486 (1990).

abort because of genetic abnormalities. Furthermore, people who know they are at risk of having a child with a severe genetic anomaly, most often desist from even attempting to have a child unless prenatal diagnosis is available.[44] Thus, once again, laws which erroneously define the conceptus as protectable life frustrate a purported purpose of such laws -- promoting the birth of children.

## CONCLUSION

Any further erosion in the fundamental right status of reproductive privacy will open the door to state laws restricting not only abortion, but also contraception and reproductive technology. Such restrictions will exacerbate the existing crisis in

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[44] Milunsky, Genetic Counseling at 2.

reproductive health care, with life-endangering consequences for many of the 55 million American women of reproductive age. For these reasons, amici submit that the Court of Appeals erred in classifying privacy as a "limited" fundamental right, the Pennsylvania statutory scheme is unconstitutional, and this Court should affirm its past decisions recognizing the fundamental nature of the right of reproductive privacy.

Respectfully submitted,

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Dated: March 6, 1992

Special recognition is given to Will Van Lonkhuyzen, Law Student, University of Chicago, for his contributions to this brief.

# APPENDIX A

## The Alan Guttmacher Institute (AGI)

The Alan Guttmacher Institute (AGI) is an independent, nonprofit corporation for research, policy analysis, and public education in the fields of reproductive health, population, and broadly related areas of health and social policy. AGI's nonpartisan programs and activities are aimed at promoting public understanding, developing sound public policy, and creating workable public and private sector programs that will enhance the ability of all women and men, in freedom and dignity, to exercise their rights and responsibilities with regard to reproduction and family formation.

## International Women's Health Coalition (IWHC)

The International Women's Health Coalition (IWHC) is a private North American organization working in alliance with women's health advocates, women's organizations, health professionals, and government officials in Southern countries and Northern institutions. The IWHC promotes women's reproductive health and rights and serves as a catalyst for action. It is concerned with the daily realities of women's lives and with programs and policies that affect their ability to

manage their sexual health and attain their reproductive rights.

**Los Angeles Regional Family Planning Council, Inc.**

The Los Angeles Regional Family Planning Council (LARFPC) is a non-profit health care management agency which includes a network of over seventy clinic sites located throughout Los Angeles County. In 1991, the LARFPC clinics provided comprehensive contraceptive services to approximately 170,000 low-income individuals. In addition to serving as an umbrella agency for the clinics, LARFPC also provides extensive training and educational programs for health care professionals and conducts clinical research on contraceptive products.

**National Association of Nurse Practitioners in Reproductive Health**

The National Association of Nurse Practitioners in Reproductive Health (NANPRH) was founded in 1980 for the purpose of assuring accessible quality family planning services which guarantee reproductive freedom to all women, and to promote and protect the delivery of family planning services by nurse practitioners. NANPRH is committed to the principle that decisions about reproductive health, including abortion, should be made by women and qualified clinicians.

**National Society of Genetic Counselors**

The National Society of Genetic Counselors (NSGC) was founded in 1978 and represents approximately 1000 genetic counselors in the United States. In 1987, the NSGC adopted a policy which states: "The NSGC, as an organization, publicly supports a woman's right to reproductive freedom, including her right to prenatal diagnosis and access to safe and legal abortion."

**National Family Planning and Reproductive Health Association (NFPRHA)**

The National Family Planning and Reproductive Health Association (NFPRHA) is a nonprofit membership corporation designed to improve and expand the delivery of comprehensive family planning and reproductive health care information and services throughout the United States. NFPRHA represents over eighty-five percent of the agencies and organizations that operate family planning programs with funds received under Title X of the Public Health Services Act of 1970.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

ERNEST D. PREATE, JR.
ATTORNEY GENERAL

March 3, 1992

Reply To

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Via Express Mail

Kathryn Kolbert, Esquire
American Civil Liberties
Union Foundation
132 W. 43rd Street
New York, New York 10036

Re: Planned Parenthood of Southeastern Pennsylvania v. Casey, No. 91-744

Dear Ms. Kolbert:

On behalf of respondents in the above-referenced case, I consent to the filing of briefs amici curiae in support of petitioners on behalf of the groups and individuals in the attached list.

Sincerely,

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

JGK:je

BEST AVAI

Brief in Support of Birth Control

Alan Guttmacher Institute
International Women's Health Coalition
Los Angeles Regional Family Planning Council, Inc.
National Association of Nurse Practitioners in Reproductive Health
National Family Planning & Reproductive Health Association
National Society of Genetic Counselors

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ACLU

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March 4, 1992

Colleen Connell
Roger Baldwin Foundation of
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RE: Planned Parenthood of Southeastern Pennsylvania, et al. v. Casey, et al., (Nos. 91-744 and 91-902).

Dear Ms. Connell:

On behalf of petitioners in the above-referenced case, I hereby consent to the filing of a brief amicus curiae in support of petitioners by the Allan Guttmacher Institute, et al., as indicated on the attached list.

Sincerely yours,

Kathryn Kolbert

Kathryn Kolbert
Counsel of Record

KK:am

BEST AVAILABLE COPY